No. 90-1038

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

THOMAS CIPOLLONE,
Petitioner,

v.

LIGGETT GROUP, INC., PHILIP MORRIS INC.,
and LOEW'S THEATRES, INC.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF THE NATIONAL LEAGUE OF CITIES, NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL ASSOCIATION OF COUNTIES, COUNCIL OF STATE GOVERNMENTS, INTERNATIONAL CITY MANAGEMENT ASSOCIATION, AND U.S. CONFERENCE OF MAYORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the Federal Cigarette Labeling and Advertising Act (FCLA), 15 U.S.C. 1331-1341, preempts common law claims based on failure to warn by cigarette manufacturers who labeled their packages in compliance with the FCLA, or based on misrepresentation, breach of warranty, or conspiracy to defraud in the content of their cigarette advertising.

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INTEREST OF THE *AMICI CURIAE*

Amici, organizations whose members include state, county, and municipal governments and officials throughout the United States, have a manifest interest in legal

issues that affect state and local governments. This case presents questions that lie at the core of *amici*'s interests: the relationship between a federal statute and state common law.

The court of appeals held that state tort law—law integral to the state's police powers over matters pertaining to health and safety—is preempted by the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. 1331-1341. This holding has profound importance for the States and their citizenry since it drastically limits the tort remedies available to persons injured by the practices of an industry. *Amici* accordingly submit this brief to assist the Court in the resolution of this case.[1]

STATEMENT

The court of appeals held that the Federal Cigarette Labeling and Advertising Act (FCLA), 15 U.S.C. 1331-1341, preempts petitioner's state law claims for failure to warn, breach of express warranty, fraudulent misrepresentation, and conspiracy to defraud insofar as they challenge advertising, promotional, and public relations activities of the respondents after 1965. See Pet. App. 17a-18a, 88a-90a. *Amici* adopt petitioner's statement of the case.

INTRODUCTION AND SUMMARY OF ARGUMENT

Under any of its guises—express, field, or conflict—the preemption analysis in this case includes two inquiries. The Court must determine, first, whether Section 5(a) of the Federal Cigarette Labeling and Advertising Act, Pub.L. No. 89-92, Sec. 5(a), 79 Stat. 283 (1965), 15 U.S.C. 1334(a), preempts state law failure to warn claims, *i.e.*, claims based on the obligation of a seller or manufacturer adequately to inform purchasers about the possible hazards of a product. Such

[1] The parties' letters of consent have been filed with the clerk pursuant to Rule 37.3 of this Court.

claims implicate packaging of cigarettes: it is through cautionary information or warnings on or in packages that manufacturers generally meet their common law duties to warn purchasers. The FCLA decrees that a federal warning label be placed on all cigarette packages, and, in Section 5(a), it prohibits other authorities from requiring other "statements" on cigarette packages. This Court must decide whether, by prohibiting authorities from requiring "statements" on cigarette packages, Section 5(a) was intended to prevent the operation of state tort law to impose common law duties to warn.

Second, the Court must determine whether Section 5(b) of the FCLA, 15 U.S.C. 1334(b), preempts state common law claims based on obligations to convey information truthfully. The 1965 Act prohibited authorities from requiring a "statement" in cigarette advertising by manufacturers whose cigarette packages were properly labeled. *See* 15 U.S.C. 1334(b) (1964 ed. & Supp. I). The question is whether that prohibition on requiring a "statement" in advertising was intended to stop the operation of the Common Law to impose duties on cigarette manufacturers to avoid misrepresentation, breach of warranty, and conspiracy to defraud. In addition, the Section 5(b) question has a second stage, since Congress amended the language of the section in 1969. *See* Public Health Cigarette Smoking Act of 1969, Pub. L. No. 91-222, 84 Stat. 88. Since that time, Section 5(b) has precluded authorities from "impos[ing] under State law" any "requirement or prohibition based on smoking and health" on cigarette advertising and promotion. 15 U.S.C. 1334(b). The question concerning Section 5(b) post-1969, then, is whether by precluding authorities from imposing under State law any "requirement or prohibition based on smoking and health," Section 5(b) was intended to preclude the operation of tort law to impose on cigarette advertisers common law duties based on the obligation to convey information truthfully.

The answer to both the Section 5(a) and the Section 5(b) inquiries is the same: Congress did not intend to preempt state tort law. Rather, Congress intended to preclude state and local legislatures and agencies from promulgating diverse and conflicting rules concerning warning labels on packages and in advertising, as well as (post-1969) differing prohibitions on cigarette advertising based on health concerns.

Application of this Court's preemption doctrine dictates this conclusion. First, the FCLA does not expressly preempt state tort law. That common law system is not specified in the Act, nor are the terms used in the Act generally used to refer to tort law.

Second, the FCLA does not impliedly preempt state tort law by occupying the field. As its language reveals, the reach of the Act is precise: Congress intended to determine only whether and what statutory warning label should attach to cigarette packages and advertisements (and, post-1969, what statutory requirements or prohibitions based on smoking and health could be imposed on advertising). The legislative history unmistakably underscores Congress's intent. Thus the record makes clear that the legislators assumed, indeed premised their action upon, the continued functioning of state tort law. They did not change that premise in 1969, when they made certain changes to Section 5(b) without any intent to add a premption of state tort law to the Act. Other aspects of the statutory scheme confirm the statute's discrete scope: the Act does not seek pervasively to regulate any area, nor does it include remedial provisions to compensate those injured by smoking.

Nor is state law preempted as conflicting with the FCLA, as is made clear by examining the effect state tort law would have on the accomplishment of the objectives of the federal Act. Tort obligations impose a duty on a manufacturer, which the manufacturer can meet in any number of ways. Because the manufacturer need not select the one method—adding a "statement" to a cigarette package or advertising—that the FCLA precludes

States from requiring, the imposition of the tort obligation does not conflict with the Act. That is true *a fortiori* in this case, where Congress afforded respondents the opportunity to influence the strength of the federal warning.

Ultimately, even if there is tension between the operation of state tort law and the objectives of the FCLA, it is a tension Congress intended to tolerate. Thus, Section 2 of the Act, current version at 15 U.S.C. 1331, makes clear that warning the public is the Act's primary objective. Because state tort laws reinforce that objective, their operation cannot be preempted on the ground that they diminish achievement of the Act's secondary objective of protecting the economy.

ARGUMENT

THE FEDERAL CIGARETTE LABELING AND ADVERTISING ACT DOES NOT PREEMPT STATE LAW TORT CLAIMS BASED ON A FAILURE TO WARN BY MANUFACTURERS OR BASED ON MISREPRESENTATION, BREACH OF WARRANTY, OR CONSPIRACY TO DEFRAUD IN THE CONTENT OF THEIR CIGARETTE ADVERTISING

Federal law preempts state law under the Supremacy Clause, U.S. Const. Art. VI, cl.2, in three circumstances. First, Congress may explicitly direct when and to what extent its enactment preempts state law. *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977). Second, state law is preempted even in the absence of an express statutory directive, if "it regulates conduct in a field that Congress intended the Federal Government to occupy exclusively." *English v. General Electric Co.*, 110 S.Ct. 2270, 2275 (1990). Finally, "state law is preempted to the extent that it actually conflicts with federal law." *Id.*

In each case, preemption remains "fundamentally . . . a question of congressional intent." *English*, 110 S.Ct. at 2275. And in each case, that inquiry is informed by the

"presuppositions of our embracing federal system," including the principle that democracy is promoted by the "diffusion of power." *San Diego Unions v. Garmon*, 359 U.S. 236, 243 (1959). Thus, respondents must overcome the presumption that Congress did not intend to preempt state law in areas, such as health and safety, *see Hillsborough County v. Automated Medical Laboratories*, 471 U.S. 707, 715 (1985), that are traditionally regulated by the States. *See California v. ARC America Corp.*, 109 S.Ct. 1661, 1665 (1989). Rather, when Congress legislates in such an area, "'we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" *Id.* (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). No matter by which preemption standard the present case is judged, respondents can make no such demonstration.

I. The FCLA Does Not Expressly Preempt State Tort Law

There is no language in the FCLA that expressly preempts petitioner's common law claims. To the contrary, the language of the Act indicates that Congress intended to preempt only legislative and executive rulemaking—including promulgation of statutes, regulations, ordinances, and rules—by state and local legislatures and agencies.

A. The court of appeals held that Congress prempted state common law tort claims in 1965 when it enacted the FCLA. Pet. App. 88a-90a. Section 4 of the Act, 15 U.S.C. 1333 (1964 ed. & Supp. I), required that all cigarette packages bear the warning statement "Caution: Cigarette Smoking May Be Hazardous to Your Health." The premption provision of the Act, Section 5, provided as passed:

> (a) No statement relating to smoking and health, other than the statement required by section 4 of this Act, shall be required on any cigarette package.

> (b) No statement relating to smoking and health shall be required in the advertising of any cigarettes the packages of which are labeled in conformity with the provisions of this Act.

15 U.S.C. 1334 (1964 ed. & Supp. I).

The language of Section 5 makes no reference to state tort law. Rather, on its face, it prohibits a narrow circumstance: it precludes any authority from "requir[ing]" a "statement" relating to smoking and health on either a cigarette package or in cigarette advertising. If Congress, by referring to a State "requir[ing]" a "statement," meant to identify state tort law, it failed notably. Indeed, given the assumption that "'the ordinary meaning accurately expresses the legislative purpose,'" *FMC Corp. v. Holliday*, 111 S.Ct. 403, 407 (1990) (quoting *Park 'N Fly, Inc. v. Dollar Park and Fly, Inc.*, 469 U.S. 189, 194 (1985)), Congress's terminology indicates instead that the legislature mean to preempt only legislative and executive rulemaking by states and localities.

First, while tort law may have "regulatory effects"—that is, it may influence behavior, *see Garmon*, 359 U.S. at 246-247,—it does so by inducing compliance through financial incentives or disincentives, not by "requiring" specific action. By contrast, "to require" an action means "[t]o demand," "insist upon," "command," or "order" it. *The American Heritage Dictionary* 1105 (W. Morris ed.) (1969). Conventionally, a State is said to "require" or "order" certain action, if it directly enforces that command by fine, injunction, or criminal prohibition. Tort law, however, depends on the initiative of private parties. They, not the State, invoke it as a state-sponsored way to resolve disputes. *See* W. Keeton *et al.*, *The Law of Torts* 7 (5th ed. 1984).

Moreover, it would be anomalous to refer to the complicated, graduated, and flexible system that is the Common Law as requiring, in specific, a "statement." There

are many ways of meeting common law duties; statements are only one method of meeting a duty to disclose.[2]

The language of a related provision of the Act confirms this reading. Referring to the preemption section (Sec. 5), the Act's declaration of policy provision expressly notes that commerce and the national economy are not to be "impeded by diverse, nonuniform, and confusing cigarette labeling and advertising *regulations*." *See* Section 2(2), 15 U.S.C. 1331(2) (emphasis added). The use of the term "regulations" rather than "regulatory activity" or even the collective "regulation" betrays Congress's intent to reach specific regulatory enactments rather than state common law that may have incidental regulatory effect.

2. In order to defend the court of appeals' judgment, respondents must demonstrate that the language of the 1965 Act, as opposed to later versions, accomplishes the preemption of petitioner's state tort claims. Indeed, given the continuity of purpose and the similarity of language between the 1965 Act and the Act as amended by the Public Health Cigarette Smoking Act of 1969, Pub. L. No. 91-222, 84 Stat. 87, it would be difficult to maintain that Congress reversed itself and preempted state tort law in the 1969 Act. In any event, there is no basis for asserting that the language of the later Act explicitly preempts state tort law.

First, Congress retained the language of Section 5(a), 15 U.S.C. 1334(a), verbatim, thus securing the continued survival of failure to warn claims. Those claims are based on the duty to inform that a seller owes a purchaser.

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[2] The reference to a "statement" on a package or in advertising, apparently as a method of disclosure, would be especially anomalous for common law claims other than failure to warn. The existence of any prescribed statement on a package or in advertising may have little relevance for claims like breach of warranty, misrepresentation, and fraud.

See Restatement (Second) of Torts § 401 (1965). Those claims are thus the ones implicated by restrictions placed on packaging. As reviewed above, under Section 5(a) they survive independent of claims depending on obligations attaching to the advertising or promotion of the product.[3]

In 1969, Congress did amend Section 5(b), concerning statements in advertising, to read:

> No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this Act.

Pub. L. No. 91-222, 84 Stat. 88, 15 U.S.C. 1334(b). In its amendment, Congress declined once again explicitly to identify tort suits. Nor did it accomplish as much by adjusting the preempting language of Section 5(b) to include any "requirement or prohibition" based on smoking and health. A "prohibition," like a requirement, generally signifies an order that only the State can enforce. *See The American Heritage Dictionary*, *supra*, at 1046 (defining "prohibition" as "the act" of "forbid[ding] by authority," of "prevent[ing] or debar[ring]"). It is an alien way to refer to tort law, in which the State has ceded the ability to prosecute noncompliance to private parties.[4]

Congress also added to Section 5(b) the phrase "imposed under State law," but the addition has little sig-

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[3] Failure to warn claims need not assert an affirmative duty on a manufacturer to disclose a hazard in advertising or promotion, a communication that reaches a wide audience of potential customers. Rather, failure to warn claims turn on the manufacturer's duty to disclose information to those who have already purchased a product. *See* Restatement (Second) of Torts § 401.

[4] *Amici* note that in the 1988 codification of the Act, Section 5(b), 15 U.S.C. 1334(b), is captioned "State regulations," reflecting a conventional understanding of the section's terminology.

nificance in the preemption inquiry. The structure of the rest of the statute makes clear the purpose and meaning of the reference: in 1969, Congress determined to treat prescriptions on advertising imposed by state legislatures and agencies separately from prescriptions imposed by the relevant federal regulatory agency, the FTC. The 1965 Act had preempted both by the same provision (*see* Sec. 5(b)) until the same date (*see* Sec. 10, 15 U.S.C. 1339 (1964 ed. & Supp. I)). In 1969, Congress wished to preempt regulatory enactments by States indefinitely (*see* Sec. 5(b) as amended; 15 U.S.C. 1334 (Effective Date note)), while preempting regulatory action by the FTC only until July 1, 1971 (*see* Sec. 7; 15 U.S.C. 1336 (1970 ed.)). Congress also left unchanged Section 2(2), with its reference to "diverse, nonuniform, and confusing cigarette labeling and advertising regulations." In short, Congress used precisely the language it would be expected to use to preempt the only laws it had in mind: directives enacted or issued by state and local legislatures and agencies to require warning labels on packages or in advertising.

II. The FCLA Does Not Impliedly Preempt State Tort Law

Where Congress has not expressly preempted state law, this Court decrees its suppression only when the Constitution leaves no choice. The doctrine of implied preemption, by whatever name or formulation, *see Hines v. Davidowitz*, 312 U.S. 52, 67 (1941), thus depends essentially on a finding that federal and state law simply cannot coexist. That finding is required if a regime of dual sovereigns, each of which is separately responsible for meeting distinct needs of the citizenry, is to function successfully. Needless invalidation of state law not only arrogates power to the central government, *see Garmon*, 359 U.S. at 243, it also leaves certain real needs—previously tended by state and local governments—unmet. *See, e.g., Pacific Gas & Electric Co. v. State Energy Resources Conserv. & Devl. Commn.*, 461 U.S. 190, 207-208 (1983).

A holding that state law is preempted in this case would be especially difficult since Congress deliberately considered the preemptive scope of the Act in Section 5, and nevertheless gave no indication that state tort law was incompatible with the federal statute. *See California Federal Savings & Loan Assoc. v. Guerra*, 479 U.S. 272, 282 (1987); *California Coastal Comm. v. Granite Rock Co.*, 480 U.S. 572, 591 (1987). State tort law, the product of generations of judicial development and a basic component of the police power of the state, is not the type of state law that Congress, focusing on the very issue of preemption, could easily overlook. *See Goodyear Atomic Corp. v. Miller*, 108 S.Ct. 1704, 1711-1712 (1988) (Congress presumed "knowledgeable about existing law pertinent to the legislation it enacts"). Indeed, application of this Court's implied preemption doctrine demonstrates that Congress intended the FCLA to coexist, as it comfortably can, with state tort law.

A. *Congress Did Not Intend The FCLA To Regulate Conduct In The Same Field As State Tort Law*

Absent express preemption, state law is preempted if "it regulates conduct in a field that Congress intended the Federal Government to occupy exclusively." *English*, 110 S.Ct. at 2275. Such intent may be inferred if "[t]he scheme of federal regulation . . . [is] so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it" or "the Act of Congress . . . touch[es] a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state law on the same subject." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); *see also Hillsborough County*, 471 U.S. at 713.

To discover the boundaries of the field that Congress intended to occupy exclusively when it passed the FCLA, " 'we look to the federal statute, read in the light of its

constitutional setting and its legislative history.'"[5] *De Canas v. Bica*, 424 U.S. 351, 360 n.8 (1976) (quoting *Hines*, 312 U.S. at 78-79 (Stone, J., dissenting)).

1. As the language analyzed above makes clear, Congress meant to control completely two discrete fields when it enacted the FCLA in 1965. In Section 5(a), it meant to proscribe any authority from "requir[ing] a "statement relating to smoking and health [other than the federal label] . . . on any cigarette *package*." In Section 5(b), Congress meant to proscribe any authority from "requir[ing]" a like "statement . . . in the *advertising* of any cigarettes" that bore the federal label. *See* 15 U.S.C. 1334(a), (b) (1964 ed. & Supp. I) (emphasis added).

By pairing its prohibitions with the requirement that a federal warning label be placed on all cigarette packages and not in cigarette advertising, Congress *did* mean to "establish a comprehensive Federal program" (Sec. 2, 15 U.S.C. 1331)—a program to forestall all similar such judgments by state legislatures and agencies. Those bodies frequently act to require statutory warnings in appropriate cases. But such actions do not without more immunize manufacturers from existing tort obligations. *See* Restatement (Second) of Torts § 288C (1965) ("Compliance with a legislative enactment or an administrative regulation does not prevent a finding of negligence where a reasonable man would take additional precautions."); *see also* Model Uniform Products Liability Act, Sec. 108, 44 Fed. Reg. 62,730-62,731 (1979).

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[5] "'Little aid can be derived from the vague and illusory but often repeated formula that Congress 'by occupying the field' has excluded from it all state legislation. Every Act of Congress occupies some field, but we must know the boundaries of that field before we can say that it has precluded a state from the exercise of any power reserved to it by the Constitution.'" *De Canas*, 424 U.S. at 360 n.8 (quoting *Hines*, 312 U.S. at 78-79 (Stone, J., dissenting)).

Rather, a statutory warning requirement supplements existing tort law by assuring warning without reliance on the tort law's system of incentives to meet duties of due care.

In this case, Congress acted nationally for all the state legislatures, and it meant to act in the same manner they generally do—imposing a statutory warning requirement without displacing existing tort law. Thus Congress chose language that stopped interference with its labeling decision by state legislatures and agencies ("No statement . . . shall be required . . ."), rather than language that would arguably have gone beyond that result to stop the functioning of the Common Law (*e.g.*, "The manufacturer shall have no additional duty to warn . . .").

The focused nature of Congress's action is made especially clear in Section 5(b) of the 1965 Act. That section, proscribing authorities from requiring different cautionary "statement[s]" in advertising, is clearly irrelevant to other common law tort claims—such as express or implied warranty, negligent or intentional misrepresentation, or conspiracy to defraud—that may turn on the content of advertising. That is, the provision in no way precludes a State from policing universally applicable duties that are unrelated to the presence (or absence) of a particular warning statement. Indeed, as we explain below (*see* pp. 17-19, 28, *infra*), even the language of Section 5(b) adopted by Congress in the 1969 Act, forbidding the imposition under state law of any "requirement or prohibition *based on* smoking and health," leaves untouched common law requirements *based on* obligations to present information truthfully, to fulfill warranty claims, and to refrain from fraudulent activity.

2. The legislative history of the Act confirms the precise nature of the statute's reach. The catalyst for the enactment of the FCLA, and indeed for dramatically heightening the controversy over the health effects of

smoking, was the publication of the Report of the Surgeon General's Advisory Committee on Smoking and Health on January 11, 1964. *See Cigarette Labeling and Advertising: Hearings on S. 559 and S. 547 Before the Senate Comm. on Commerce*, 89th Cong., 1st Sess. Part 2 (1965) [hereafter *1965 Senate Hearings*]; H.R. Rep. No. 449, 89th Cong., 1st Sess. 2-3 (1965); S. Rep. No. 195, 89th Cong., 1st Sess. 2-4 (1965). The Report's conclusion that cigarette smoking was a health hazard sufficient to warrant "appropriate remedial action" elicited an immediate response from the FTC: the Commission issued a notice of proposed rulemaking to require a stringent federal warning label both on cigarette packages and in cigarette advertising. H.R. Rep. No. 449, *supra*, at 2; S. Rep. No. 195, *supra*, at 4; *see also id.*, at 14-17 (letter from Paul Dixon, Chair, FTC).

Against this background, Congress determined to take action for several reasons. It recognized first that protection of public health required the federal government, "upon which persons have come to rely for cautionary labeling of hazardous substances," to take affirmative action that would "manifest its concern." H.R. Rep. No. 449, *supra*, at 3. In addition, Congress wanted to forestall the "chaotic marketing conditions and consumer confusion" that would occur if state and local governments began passing "a multiplicity of . . . regulations" in response to the Surgeon General's Report. *Id.* at 4; *see also, e.g.*, 111 Cong. Rec. 13,893 (1965) (Statement of Sen. Magnuson). Finally, Congress acted quickly to reserve the federal labeling decision, which the FTC was demonstrably willing to make, to itself. *See, e.g., id.* at 14,408-14,409 (Statement of Rep. Harris); *id.* at 14,413 (Statement of sponsor, Rep. Rogers).

In the FCLA, Congress targeted precisely the problems it perceived. First, Congress made the labeling decision: it determined that a statutorily prescribed label should be placed on cigarette packages, but not in cigarette advertising. And, Congress kept state bodies and the FTC from second-guessing its determination: the language of Section 5 prohibited either state governments or the FTC from requiring different labels on cigarette packages or in advertising.

The precision of Congress's aim is amply reflected in the record of its action. Thus the debates are replete with references making it clear that Congress was concerned with state action by "legislative and health authorities," 111 Cong. Rec. 13,929 (1965) (Statement of Sen. Neuberger), and other "State and local agencies," *id.* at 13,930 (Statement of Sen. Morton), not state judges.[8]

Congress's debate concerning the labeling requirement itself is similarly revealing. The decision to require a label on cigarette *packages* was made essentially without controversy—itself an indication that Congress did not intend its label to effect so dramatic a change as the

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[8] *See, e.g.*, statements at 111 Cong. Rec. 13,893 (1965) (Sen. Magnuson) ("regulations"); *id.* at 13,901 (Sen. Moss) ("regulations"); *id.* at 13,911 (Sen. Cooper) ("State and local bodies"); *id.* at 13,930 (Rep. Morton) ("State and local agencies" and "laws"); *id.* at 14,410 (Rep. Springer) ("legislation," "statutes"); *id.* at 14,414 (Rep. Nelsen) ("50 different state labels," "50 different States"); *id.* at 14,419 (Rep. Cooley) ("legislat[ion]); *id.* (Rep. Ottinger) ("enact[ment]"). Indeed, these same statements generally refer to the problems that will be presented when state or local authorities begin acting in the area—references to future action that would hardly apply to the common law system already in place.

Even occasional claims that the Act will "absolute[ly] preempt" States from taking action contain language revealing that the "absolute preemption" referred only to completely preventing actions by state and local legislatures or agencies. *See, e.g.*, H.R. Rep. No. 449, *supra*, at 20-21 (Min. Views); 111 Cong. Rec. 14,419 (1965) (Statement of Rep. Ottinger); *id.* at 16,542-16,543 (Statement of Rep. Moss).

displacement of state tort law. The focus of congressional debate was instead whether requiring a label in *advertising* was contrary to "the American principle of free enterprise and freedom of choice" because it made the medium "self-defeating." [7] *Cigarette Labeling and Advertising—1965: Hearings on H.R. 2248, H.R. 3014, H.R. 4007, H.R. 7051, and 4244 Before the House Comm. on Interstate and Foreign Commerce* 364 (1965) [hereafter *1965 House Hearings*] (Statement of Rep. Kornegay). Ultimately, Congress determined that:

> Considering the combined impact of voluntary limitations on advertising, the extensive smoking education compaigns [sic] now underway, and the compulsory warning on the package . . . no warning in cigarette advertising should be required pending the showing that these vigorous, but less drastic, steps have not adequately alerted the public.

S. Rep. No. 195, *supra*, at 5; *see also* H.R. Rep. No. 449, *supra*, at 4. That is, Congress determined to delay requiring a warning statement in advertising precisely because of its desire to avoid intruding any further than necessary into the relation between cigarette manufacturers and consumers.

But tort law is itself an element of the very relation between seller and buyer that Congress sought to leave undisturbed. Indeed, the record demonstrates unequivocally that Congress legislated on this premise. Thus, the members of Congress do discuss tort law during the

[7] *Compare, e.g.*, 111 Cong Rec. 13,929 (1965) (Statement of Sen. Neuberger); *id.* at 14,411 (Statement of Rep. Harris); *Cigarette Labeling and Advertising—1965: Hearings on H.R. 2248, H.R. 3014, H.R. 4007, H.R. 7051, and H.R. 4244 Before the House Comm. on Interstate and Foreign Commerce* 105 (1965) (Statement of Rep. Pickle), with statements at, *e.g.*, 111 Cong. Rec. 13,929 (1965) (Sen. Neuberger); *1965 House Hearings, supra*, at 358-365 (Wm. Crissy, Prof. of Marketing, Mich. State Univ.); *1965 Senate Hearings, supra*, at 130-131 (Emerson Foote, Chair, Nat'l Interagency Council on Smoking & Health).

debates—but in order to consider how the warning required by the FCLA might affect the merits of tort claims. For example, shortly before adoption of the conference report in the House, Representative Fascell noted that the FCLA "in no way affects the right to raise the defense of 'assumption or [sic] risk' . . . nor does it shift the burden of proof, nor could it be considered a legal or factual bar to the plaintiff user." 111 Cong. Rec. 16,543-16,544 (1965).[8] Congress's decision to minimize disrupting the relation between manufacturers and consumers cannot be parlayed into the antithetical conclusion that Congress intended to suppress all state tort law.

Nor did Congress change course in 1969, when it amended Section 5(b) to preclude any "requirement or prohibition based on smoking and health" from being "imposed under State law" on cigarette advertising or promotion. Congress re-examined the Act shortly before the three-year term of Section 5(b) (Section 5(a) had no termination date) was to expire. The legislature found undiminished the federal regulatory effort to control cigarette advertising. The FCC, which had applied its Fairness Doctrine to require public service "anti-smoking" announcements, now announced plans to ban all advertising from television and radio. The FTC announced its intention to resume proposed rulemaking to require health warnings in advertising. *See* H.R. Rep. No. 289, 91st Cong., 1st Sess. 3-4 (1969); S. Rep. No. 566, 91st Cong., 1st Sess. 6-8 (1969).

[8] Similarly, H.E.W. Acting Assistant General Counsel Theodore Ellenbogen testified during the hearings that products liability would "be a private matter and would not be regulated by the bill"; the agency also submitted a supporting legal memorandum. *1965 House Hearings, supra*, at 176-178. *See also* 111 Cong. Rec. 16,545 (1965) (Statement of Rep. Fascell) (noting that warning may aid plaintiff by demonstrating defendant's knowledge of hazard); *id.* at 16,546 (Statement of Rep. Udall) (referring to assumption of risk defense); *1965 House Hearings, supra*, at 422 (Statement of Paul Dixon, Chair, FTC) (similar).

The original House bill, H.R. 6543, 91st Cong., 1st Sess., simply extended the expiration date for Section 5(b), on the assumption that the existing language of the section would prevent the "intrusion" planned by the FCC and the FTC, and similar action by the States. *See* H.R. Rep. No. 289, *supra*, at 3-5; *id.* at 31 (Min. Views). In fact, however, the question whether the language of the 1965 Act actually prohibited a ban on advertising was hotly contested.[9] The Senate also debated a new development in the saga of the federal regulatory effort. After passage of the House bill, the cigarette industry responded to the FCC's calls for a prohibition on advertising by announcing a willingness voluntarily to terminate broadcast advertising. S. Rep. No. 566, *supra*, at 8-10. In response, the FTC agreed to suspend its rulemaking proceedings until at least July 1, 1971.

Congress amended Section 5(b) in light of these events. It tailored the Act to the new federal regulatory picture by limiting Section 5(b) to "State law" while detailing the limits on FTC authority in a new Section 7. *See* Sec. 7, as added by Pub.L. No. 91-222, 84 Stat. 89 (1970); S. Rep. No. 566, *supra*, at 12; *see also* Sec. 6, as added by Pub.L. No. 91-222, 84 Stat. 89 (1970) (formalizing the withdrawal of cigarette advertising from the broadcast media as a prohibition on such advertising).[10] While it had become unnecessary to explicate the limits on the FCC's authority to prohibit broadcast advertising, Congress moved to

[9] *See, e.g.*, statements at 115 Cong. Rec. 16,169-16,170 (1969) (Rep. Eckhardt); *id.* at 16,288-16,289 (same); *id.* at 16,174, 16,176 (Rep. Adams); *id.* at 16,300 (Rep. Broyhill); *id.* at 16,290-16,291 (Reps. Koch, Fountain).

[10] Congress also defined the term "State" in the Act to include "any political division of any State." *See* 15 U.S.C. 1332(3). The amendment was meant to clarify that the Act's preemption "is intended to include not only action by State statute but by all other administrative actions or local ordinances or regulations by any political subdivision of any State." S. Rep. No. 566, *supra*, at 12. Again, mention of state judges is conspicuously absent.

dispel the lingering dispute over the ability of state governments to ban advertising altogether or in part. The legislature amended Section 5(b) to specify that the States could impose "[n]o requirement *or prohibition*" on advertising or promotion "based on smoking and health." Emphasis added. As the Senate report clarified, the preemption was narrowly restricted to requirements or prohibitions "based on smoking and health" so as not to affect State power to regulate cigarette sales, taxation, or smoking on other bases. S. Rep. No. 566, *supra*, at 12.[11]

Thus Congress in 1969 amended the FCLA for reasons that had nothing to do with state tort law, and without any intention to disturb the operation of that law. To the contrary, the legislators' pervasive assumption was that "nowhere in the act of 1965 does it preclude an individual . . . from pursuing a common-law liability [claim] against any tobacco company." *Cigarette Labeling and Advertising—1969: Hearings on H.R. 643, H.R. 1237, H.R. 3055, and H.R. 6543 Before the House Comm. on Interstate and Foreign Commerce*, 91st Cong., 1st Sess. 579 (1969) [hereafter *1969 House Hearings*] (Statement of Rep. Watson): Thus, their sole concern about state tort law was whether a more stringent federal warning label, *see* Sec. 4, as amended, 15 U.S.C. 1330 (1970 ed.), might strengthen the tobacco companies' assumption of the risk defense.[12]

[11] In fact, the amendment originally referred to requirements or prohibitions "imposed by any State statute or regulation." 115 Cong. Rec. 38,732 (1969). It was rephrased in Conference as part of a "minor technical amendment[]." 116 Cong. Rec. 6628 (1970).

[12] *See* 115 Cong. Rec. 16,179 (1969) (Statements of Rep. Moss) (criticizing bill for relieving industry "of a major part of its liability" because smoker will be held to have had "fair warning"); *id.* at 16,278, 16,285 (1969) (similar); *id.* at 37,742 (Statement of Sen. Baker) (apparently suggesting that federal statement of hazard could create tort liability for manufacturer); *id.* at 38,749-39,750 (Exchange between Reps. Cotton and Moss) (concerning effect of label on assumption of the risk defense);

3. The structure of the statute completes the evidence that Congress meant the federal government to be the sole authority in two discrete fields: (1) prescribing the warning label placed on cigarette packages, and (2) determining what warning requirements or prohibitions based on smoking and health should attach to advertising. Thus the statute attempts no significant regulation of the cigarette industry.[13] *Compare, e.g., Hillsborough County*, 471 U.S. at 716-718 (rejecting more comprehensive federal regulation as insufficient to imply preemption). Nor does the Act appoint an administrative agency to administer any regulatory program. *Compare, e.g., Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 319-324 (1981) (considering plenary power delegated to agency as indication that preemption warranted); *Garmon, supra* (same).

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see also 1969 House Hearings, supra, at 263 (Statement of former Surgeon General Terry) (charging that "the so-called warning statement is a hoax on the American people, for under the product liability laws of several States the label could be a sufficient disclaimer of manufacturers' liability"); *id.* at 267-268 (Exchange between Terry and Rep. Satterfield) (concerning whether stricter label would "be even a bigger hoax"); *id.* at 380 (Exchange between Dr. Sherman and Rep. Preyer) (concerning effect of FCLA in recent cases given assumption of risk defense); *id.* at 577-581 (Exchange between Reps. Moss, Watson, Dingell, and Joseph F. Cullman III, Chair, Exec. Comm. of The Tobacco Institute) (concerning whether industry in 1965 had supported Act in order to benefit from strengthened assumption of risk defense, or whether "one of the functions of the law" was "to strip potential litigants" of claims given that defense); *id.* at 582 (Statement of Rep. Watson) (similar); *id.* at 588-589 (Statement of Rep. Thompson) (similar); *id.* at 592 (Statement of Rep. Satterfield) (similar); *id.* at 600 (Statement of Rep. Dingell) (similar).

[13] For example, the statute does not address advertising expenditures or cigarette production; promotion of public education; programs of health research in government or industry; or enforcement of disclosure requirements by industry. Not until 1984 did Congress determine to set a "new strategy" by taking action in some of these areas. *See* Comprehensive Smoking Education Act, Pub. L. 98-474, Sec. 2, 98 Stat. 2200 (1984).

Most notably for present purposes, the Act does not regulate or provide for compensating those injured by cigarette smoking. Its remedial provisions are instead paired with the discrete fields it carves out, establishing criminal and injunctive enforcement of the Act's requirements. *See* 15 U.S.C. 1338-1339. It is virtually inconceivable "that Congress would, without comment, remove all means of judicial recourse" for those in need of compensation. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 251 (1984). "The only reasonable inference is that Congress intended the States to continue to make these judgments" through the common law system. *Pacific Gas & Electric*, 461 U.S. at 208 (referring to economic decisions); *Silkwood*, 464 U.S. at 251.[14]

"Undoubtedly, every subject that merits congressional legislation is, by definition, a subject of national concern." *Hillsborough County*, 471 U.S. at 719. This Court has, however, consistently taken care frugally to define the fields occupied exclusively by the federal government.[15]

[14] *See also International Paper Co.* v. *Ouellette*, 479 U.S. 481, 497-498 (1987); *Kalo Brick*, 450 U.S. at 321-324 & n.9; *Farmer v. United Bro. of Carpenters & Joiners*, 430 U.S. 290, 298-300 (1977); *compare Ingersoll-Rand Co.* v. *McClendon*, 111 S.Ct. 478, 484-486 (1990).

[15] In *Silkwood*, for example, the Court declined to preempt a suit claiming punitive damages for personal injury, despite the fact that "'the Federal Government ha[d] occupied the entire field of nuclear safety concerns'" and "foreclos[ed] . . . the States from conditioning the operation of nuclear plants on compliance with state-imposed standards." 464 U.S. at 249, 251 (internal quotation omitted). *See also, e.g., Pacific Gas & Electric*, 461 U.S. at 212 (declining to preempt state restriction of construction of nuclear plants due to inadequate waste storage facilities despite federal government's exclusive control over safety aspects of waste disposal); *United Brotherhood of Carpenters*, 430 U.S. at 296 (declining to follow broad preemption rule in labor context, given state interests "so deeply rooted in local feeling and responsibility" that preemption warranted only by compelling congressional direction); *Linn* v. *Plant Guard Workers*, 383 U.S. 53, 61 (1966)

Given that approach, it is clear that the FCLA is not "so pervasive" a scheme of federal regulation that it preempts state common law.

The evidence demonstrates as well that Congress did not consider the federal interest in providing warning to the public while minimizing disruption to the economy to be "so dominant" as to preempt state common law. *Compare, e.g., Hines*, 312 U.S. at 73 (national interest dominant in registration of aliens); *cf. New Mexico* v. *Mescalero Apache Tribe*, 462 U.S. 324, 336-342 (1983) (same in regulation of Indian affairs). To the contrary, Congress here premised its Act on the assumption that state tort law would continue operating to compensate those injured by the danger Congress now publicized.

B. *The Operation of State Tort Law Does Not Conflict With the FCLA*

The statutory scheme of the FCLA, designed on the premise that state tort law would continue to operate, is not obstructed by the operation of state tort law.

First, it is manifestly not "physically impossible" for respondents to comply with both state and federal law. *See, e.g., Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143 (1963); *Free v. Bland*, 369 U.S. 663 (1962) (federal law conferring right of survivorship conflicted with Texas community property law); *McDermott v. Wisconsin*, 228 U.S. 115 (1913) (compliance with federal labeling regulations caused mislabeling under state statute). The FCLA requires only that respondents label their cigarette packages properly.[16]

(similar); *De Canas*, 424 U.S. at 359 (declining to preempt state law regulating employment of aliens despite the "comprehensiveness of the INA scheme for regulation of immigration and naturalization").

[16] The requirement that a cautionary notice be added to cigarette advertising was added to the Act in 1984. *See* Comprehensive Smoking Education Act, Pub. L. 98-474, Sec. 4(a), 98 Stat. 2201 (1984); 15 U.S.C. 1333.

State tort law may (or may not) impose a more stringent duty to warn, which respondents could meet by adding an additional cautionary label to cigarette packages or adding a package insert. State law also imposes a duty on respondents to avoid misrepresentation, breach of warranty, and conspiracy to defraud; respondents can meet these duties without removing the federal label on the cigarette packages.

Nor does state tort law "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines*, 312 U.S. at 67. The compatibility of the federal and state laws becomes clear when the "purposes and objectives" of the FCLA are identified and the effect of state tort law on those purposes is analyzed. *See Perez v. Campbell*, 402 U.S. 637, 649-652 (1971). An agreement of purposes between federal and state laws will not suffice if the state law obstructs the methods chosen by the federal government to reach its goals. *See Ouellette*, 479 U.S. at 494.

1. In Section 2 of the 1965 Act, Congress identified the "Policy and Purpose" of the FCLA:

> It is the policy of the Congress, and the purpose of this Act, to establish a comprehensive Federal program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health, whereby—
>
> (1) the public may be adequately informed that cigarette smoking may be hazardous to health by inclusion of a warning to that effect on each package of cigarettes; and
>
> (2) commerce and the economy may be (A) protected to the maximum extent consistent with this declared policy and (B) not impeded by diverse, nonuniform, and confusing cigarette labeling and ad-

vertising regulations with respect to any relationship between smoking and health.

Pub.L. No. 89-92, 79 Stat. 282 (1965); *see* 15 U.S.C. 1331 (1970 ed.).[17]

The purpose of the statute is thus two-fold. First, the FCLA aims to "adequately inform[]" the public that cigarette smoking may be hazardous. The method chosen to accomplish this objective is the requirement of a federal warning label on all packages of cigarettes (*see* Sec. 4). Second, the Act aims to keep commerce and the national economy "protected to the maximum extent consistent with [the Act's] declared policy" and "not impeded." The method chosen to accomplish this goal is the preclusion of "diverse, nonuniform, and confusing labelling and advertising regulations" (*see* Sec. 5).

2. It becomes clear by examining how state tort law would actually operate in this case that it does not "stand as an obstacle" to the achievement of either objective of the Act, nor to the methods Congress chose to implement those objectives.[18]

As an initial matter, certain tort claims—those based on strict liability—do not affect behavior at all because

[17] Section 2 was amended in the Comprehensive Smoking Education Act, Pub. L. No. 98-474, Sec. 6(a), 98 Stat. 2204 (1984).

[18] It is not enough to conclude, as the court of appeals did in this case, that tort law may have "regulatory effect" as if that phrase (generally paired with a citation to the *Garmon* case) has talismanic significance. *See* Pet. App. 106a. Rather, it is necessary to identify how tort law—which is distinctive in the way it "regulates," *see Goodyear Atomic Corp.*, 108 S.Ct. at 1712—would operate on the federal scheme at issue here.

Garmon is generally cited to obscure this inquiry, but the case itself does not sweep so broadly. *See English*, 110 S.Ct. at 2279 n.8. Rather, the "unifying consideration" that led the Court's inquiry in *Garmon*, as in other NLRA cases, was that Congress had entrusted administration of labor policy to a "centralized administrative agency"—whose "administration" therefore was itself "regulation" that could not be obstructed. *See Garmon*, 359 U.S. at 242, 243. Given the need to delimit the area free from any but national

there is nothing a manufacturer can do to avoid payment. *See Silkwood*, 464 U.S. at 276 n.3 (Powell, J., dissenting). Such "no fault" claims are purely remedial: they function to redistribute the cost of injury from victim to manufacturer. *Cf. id.* at 263-265 (Blackmun, J., dissenting).

More generally, state law damage suits influence behavior by incentive. Unlike the flat prohibitions imposed by fines, injunctions, or criminal prohibitions, they present a manufacturer with two broad choices: the manufacturer can pay damages without changing its business methods, or it can take actions it deems sufficient to comply with obligations imposed by the State's product liability law.

a. *The 1965 Act.*

Putting a manufacturer to such a choice does not jeopardize either the objectives or the methods specified by the 1965 Act. The decision by a manufacturer either to pay damages or to meet additional state standards plainly does not obstruct the first federal goal—to warn the public by provision of a federal warning label. Payment by a manufacturer to injured plaintiffs does not interfere with the federal requirement to include a warning label. Nor would the manufacturer's adoption of extra measures, whether by additional voluntary disclosures on cigarette packaging, inside packaging, or in advertising, inhibit the manufacturer's ability to provide the federal warning.[19]

control, *see id.* at 246, the "method" by which States sought to "regulate" any subject was irrelevant. *See id.* at 243; *see also Kalo Brick*, 450 U.S. at 319-324 (focusing on plenary power of ICC).

[19] Section 2 makes clear that all Congress required as far as its objective to warn consumers was the assurance of a federal warning on each package. Its interest in excluding other state-required labels stemmed instead from its objective to protect commerce. *See* Sec. 2(2). But even if Congress felt for purposes of its warning objective that the federal label somehow needed to be alone on the package (or that the public was somehow more

Similarly, the decision by a manufacturer either to pay damages or meet additional state standards would not impede the second federal goal—to protect the economy and commerce from disruption by precluding the imposition of different labeling requirements on a national manufacturer.

The manufacturer could decide, of course, to pay damages. That strategy, assumed nationally, would add to the cost of doing business; it would not, however, disrupt business practice by requiring a manufacturer to tailor the label to many different state or local regulations.

Nor would the choice by a company to meet local products liability standards conflict with the federal purpose of protecting the national economy. Methods of meeting state liability obligations are wide-ranging while the federal prohibitions in the 1965 Act are extremely narrow. For example, a duty to warn could be met in any number of ways aside from including a "statement" on a cigarette package or in cigarette advertising. And, the method of meeting that disclosure requirement could be implemented nationally: the company could insert into all packages a notice to consumers like those found in products from aspirin to household appliances.[20]

In short, the essence of products liability law is to impose a duty; the manufacturer can satisfy that duty in any number of ways. Thus, state tort suits cannot realistically be said to "require" the selection of the one

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adequately warned by excluding state warning requirements in advertising), a choice by the manufacturer to comply with state law would not lead to the frustration of federal law, for the reasons explained below. *See* pp. 26-27, *infra*.

[20] The cigarette manufacturers' only complaint could be that, in order to protect themselves completely from liability, they (like other manufacturers) would have to model the warning to meet standards in the States most protective of their citizens. *Amici* do not understand this concern to be the foundation of respondents' arguments. In any case, while such a warning may decrease sales because more information is made available to the public, the Act does not identify that type of economic disruption as its concern.

method—the addition of a "statement" to either a package (Sec. 5(a)) or advertising (Sec. 5(b))—that would disrupt the economy and impede commerce in a manner arguably inconsistent with the FCLA. *See Rice v. Norman Williams Co.*, 458 U.S. 654, 659 (1982) (existence of "potential conflict" not sufficient to warrant preemption).[21]

There is, however, yet another choice available in this case: the very existence of the federal scheme provides manufacturers with the option of petitioning Congress to obtain a stronger federal warning, thereby safeguarding themselves against failure to warn claims. In fact, respondents were offered precisely this choice. In a lengthy exchange with Joseph F. Cullman III, who represented the cigarette manufacturers before Congress during the 1969 hearings, a number of congressmen emphasized the fact that Congress "would be aiding the tobacco companies" by amending the Act to require a stronger warning since "in effect from a legal standpoint it would give [tobacco companies] a better chance against anyone charging that they had contracted a disease of some sort because of the use of cigarettes." *See 1969 House Hearings*, *supra*, at 589 (Statement of Rep. Thompson); *id.* at 577-600 (Exchange with Reps. Moss, Broyhill, Watson, Dingell, Satterfield). Cullman was then asked to "state his preferences" regarding a number of proposed warning labels. *See id.* at 589 (Statement of Rep. Pickle). The industry thus faced explicitly and in a federal forum the decision incumbent on all manufacturers to balance concerns about liability against the possibility of diminished profits. In light of this additional channel for making the disclosure decision, a channel that would (and still may) ease litigation burdens by standardizing the liability issue, it is incongruous for respondents to argue

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[21] Likewise, common law obligations not to breach express warranties, not to make affirmative misrepresentations, and not to engage in fraudulent activity need not be carried out by way of making a "statement" either on packaging or in advertising.

that they are immunized from compliance with state tort law by the existence of the federal statute.[22]

b. *The 1969 Act.*

Congress did not bring the Act into conflict with state law when it amended the statute in 1969. The narrow language of Section 5(a), of course, remained unchanged. Thus manufacturers seeking to meet state law duties to warn, which are generally based on duties to notify purchasers by placing notices in or on packaging, *see* note 3, *supra*, faced the same set of choices they had in 1965.

As reviewed above, Congress broadened the language of Section 5(b) in order to clarify that just as States could not require cautionary content in advertising, neither could they "prohibit" advertising or promotion altogether or in part for reasons "based on smoking and health." The amendment creates no conflict, because claims "based on" common law duties (such as the obligation to be truthful) function independently of requirements or prohibitions "based on smoking and health." *See* page 19, *supra*. The terminology accurately reflects the fact that Congress was writing with state legislatures and agencies in mind; it thus preserves the statute from conflicting with state tort law.[23]

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[22] Instead of operating on the assumption that state tort law would continue in effect, respondents could, of course, have petitioned Congress to preempt state tort law expressly. They did not make that request, apparently because of their disagreement with the conclusion that smoking caused injury. *See 1969 House Hearings*, *supra*, at 600 (Testimony of Joseph F. Cullman III, Chair, Exec. Comm. of The Tobacco Institute) (noting that liability suits had not been problem for industry because plaintiffs were not prevailing). Because respondents did not bring to Congress the preemption request they now make to the Court, the chances that preemption of state tort law was part of the congressional compromise on the bill are small.

[23] The importance of the term "based on" is a point well made by comparing the language of the court of appeals, the respondents, and the petitioner in this case. The court of appeals held pre-

3. Ultimately, the existence of a conflict that warrants preemption remains a question of congressional intent. Even if it perceives tension between the operation of state law and a federal statute, this Court cannot conclude that preemption is required if the statute, its structure and history indicate that Congress is willing to live with that tension. *Silkwood*, 464 U.S. at 256.

Section 2 of the Act establishes that Congress was willing to tolerate whatever tension may exist between the FCLA and state tort law. According to that section, the "policy of Congress" and "purpose of this Act" is to establish a comprehensive federal program through which (1) "the public may be adequately informed" and (2) "commerce and the national economy may be [] protected *to the maximum extent consistent with this declared policy.*" Emphasis added. This last proviso is grammatically circular: the national economy is to be protected only to the extent consistent with a policy "whereby the public may be adequately informed . . . and the economy may be [] protected to the maximum extent consistent with" the policy. However, it seems most likely that Congress meant in the second clause to refer to the "policy" as given substance in the first clause. That is, the primary policy or purpose of the Act is adequately to warn the public by requiring a federal label on cigarettes.[24]

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empted all state tort claims "*relating to* smoking and health." *See* Pet. App. 106a (emphasis added). The respondents similarly rephrase the scope of Section 5(b) in their Question Presented as including "*health-related* 'requirement[s] or prohibition[s].'" *See* Resp. Mem. i (emphasis added). That is, the conclusion that Section 5(b) has a broad preemptive sweep necessitates a departure from the clear language of the statute. *Compare FMC Corp.*, 111 S.Ct. at 407-408 (discussing breadth of phrase "relates to" for preemption purposes). Petitioner, by contrast, accurately refers in his Question Presented to claims "premised on" the adequacy of warnings, the propriety of advertising, or deceptive behavior. *See* Pet. i.

[24] *See, e.g.*, H.R. Rep. No. 449, *supra*, at 1 ("The principal purpose of the bill is to provide adequate warning to the public"); 111 Cong. Rec. 14,409 (1965) (Statement of Rep. Harris) (simi-

There may be circumstances in which Congress's primary purpose adequately to warn the public is not accomplished by the federal label. In these circumstances, incentives to add additional warnings would reinforce, not undermine, the primary warning purpose of the Act and the federal label. And in that situation, the Act's secondary goal—to protect commerce and the economy by precluding diverse labeling requirements—must give way. That goal, to be achieved only "to the maximum extent consistent" with Congress's primary purpose that the public receive adequate warning, is subordinate to the accomplishment of that primary purpose.[25]

CONCLUSION

The judgment of the court of appeals should be reversed.

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lar); *id.* at 14,418 (Statements of Reps. Broyhill, Cooley) (similar); *id.* at 16,541 (1965) (Statement of Rep. Harris) (similar).

[25] The court of appeals, by conflating Section 5 (15 U.S.C. 1334) and Section 2 (15 U.S.C. 1331), effectively reads Section 2 as a definitional section. *See* Pet. App. 105a-106a. Under that interpretation, Congress in Section 2 identified a comprehensive federal program under which, *by definition*, the public is adequately warned by the federal label alone because any additional warning would upset the balance struck by the Act.

The problem is that Congress did not identify Section 2(1) as a definition. Rather, that section is part of the "purpose," not the "effect," of the federal program. Moreover, Congress's determination to preclude diverse warning labels does not, according to the statute, have to do with the *warning* objective of the Act. *See* Sec. 2(1). Rather, it is the method chosen to reach the *protection of the economy* objective. *See* Sec. 2(2). Thus, the method (precluding diverse labels) does not function as part of the definition that the public be adequately warned. It should not, therefore, be incorporated into that "definition."

Respectfully submitted,

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